7 Otto 426
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~334~~ 73

BERNARD P. MIMMACK, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 24, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 334.

BERNARD P. MIMMACK, APPELLANT,

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INDEX.

	Original.	Print.
Petition	1	1
Traverse	15	11
Judgment of the court	16	12
Application for allowance of appeal	17	12
Order allowing same	17	12
Finding of facts and conclusion of law	18	12
Opinion of the court	21	15
Concurring opinion	23	17
Certificate	26	18

1 *Petition.—Filed Sept. 2, 1873.—J. R.*

United States Court of Claims, December term, 1872.

BERNARD P. MIMMACK, CAPTAIN OF INFANTRY and brevet major in the Army of the United States,
vs.
THE UNITED STATES.
} No. 7839.

Bernard P. Mimmack, captain of infantry in the Army of the United States, claiming pay and allowances as such, according to law, from the eleventh day of December, A. D. 1868, until the date of the institution of this suit, and thereafter until the same shall be adjudged unto him, by this his petition to the Court of Claims of the United States, respectfully states:

1. That on the 15th day of January, A. D. 1858, he entered the service of the Army of the United States as a private therein, became a non-commissioned officer before the rebellion, and became sergeant-major, and afterwards, in succession, a commissioned officer, regimental adjutant of the 12th Regiment of Infantry, captain, and brevet major, serving in the Army on active duty throughout the war.

2. That being, in May, 1868, a captain of the 30th Regiment of Infantry of the United States, on duty as such, and stationed at Sidney, Nebraska, and charges being prepared, to be preferred against him, but not yet preferred, for drunkenness, your petitioner, on condition that they should be abandoned, agreed to draw up and sign a resignation of his captaincy, without date, and to place the same in the hands of L't-
2 Col. J. H. Potter, 30th Infantry, and brevet brigadier-general, the same to be forwarded by him to the War Department in case your petitioner should at any time thereafter become intoxicated.

3. That in the month of October, A. D. 1868, without the knowledge of the petitioner, and when he had not been intoxicated, but upon information to that effect given to said L't-Col. Potter, the said L't-Col. Potter, without investigating the charge or making it known to the petitioner, or having his consent to send on the said resignation so made and signed in blank in the month of May preceding, dated the same and sent it to the War Department, or caused it to be dated and sent by Gen. Augur.

4. That the President of the United States, supposing it to be really and in truth the resignation of the petitioner, and not knowing that he had no knowledge of its transmission, and had not been allowed opportunity to be heard in his own defence or confronted with the informants of his lieutenant-colonel, accepted the same; and on the 8th day of November, A. D. 1868, in Fort Sanders, Wyoming Territory, your petitioner received the letter of the War Department, dated October 29, 1868, informing him that the President of the United States had accepted his resignation, to take effect on that date.

5. That so soon as the petitioner could turn over to his successor in command of his company the public property and funds for which he was responsible, he repaired to the city of Washington, obtained an interview with the President of the United States, laid before him the whole case in all its circumstances, and proved to the President that he had risen from the ranks by merit and had served the country faithfully, zealously, intelligently, and efficiently during the whole war of the rebellion, and that the paper purporting to be his resignation had been

forwarded without his knowledge, and without any opportunity given him to disprove the charge, upon the truth whereof alone and upon its being proven, after opportunity to him to be heard and defend against it, the said paper could be treated as his resignation, or be such either in fact or law.

6. That the petitioner never having resigned, nor consented to, nor known of the forwarding or dating of said paper, nor having been, in fact, before it was forwarded, in a condition of intoxication, the
3 President, on reviewing the charges and examining into the facts, and the case not coming under the provisions of the act of Congress approved July 20, 1868 (Gen. Order, § 58, series of 1868), did, on the eleventh day of December, 1868, revoke and recall his acceptance of the petitioner's resignation, and notify the War Department thereof, and direct the return to him of such acceptance.

7. That the supposed vacancy caused by such supposed resignation had not then been filled by any confirmation by the Senate of the United States.

8. That after some time had elapsed, the petitioner receiving no orders to rejoin his regiment, again applied to the President, who again in the early part of the year 1869, positively reiterated the order revoking his acceptance; but the same was not regarded by the Department of War.

9. That the action of the President in revoking and recalling his acceptance, even if there had been a real and actual resignation, afterwards repented of, was in conformity with an established custom, that had always been regarded as lawful, that power having been exercised by many of his predecessors; a custom so well established, that the Digest of the Opinions of the Judge-Advocate-General, of 1866, contains a paragraph providing for such revocations, on page 210, where it is determined that "the revocation of an order accepting the resignation of an officer of the Regular Army is not in the nature of a new appointment."

10. That President Lincoln and President Johnson restored many officers to both the Army and Navy, by executive orders revoking acceptances of resignations; in none of which cases was any reconfirmation by the Senate had, or deemed necessary, nor was any question ever made as to the validity of the revocation in those cases; and many of such officers are still in the service.

11. In January, 1869, the case of the petitioner was submitted by the War Department to the Attorney-General, who on the 10th of February, 1869, gave his opinion thereon; in which the case, as submitted, was stated; the material facts being expressly shown, that the resignation was placed, without date, in the hands of L't Colonel Potter, with authority to place it in the hands of Gen. Augur, to be forwarded to the War Department, should "he" (the petitioner) "ever become intoxi-
cated again," and that it was forwarded on the 5th of October by
4 Gen. Augur, on a report made by L't Colonel Potter, that the petitioner had "again broke out drinking hard," &c.

12. That the Attorney-General, whose opinion is herewith exhibited, without considering or paying attention to the question whether there was any resignation in law or fact, decided that an acceptaance of a real resignation could not be recalled; but by the acceptance the party resigning ceased to be in the service, and could be restored only by a new appointment. And he distinguished from the petitioner's case others that had been decided, where the resignations were nullities be-

cause of the party's insanity, or where there really was not a resignation.

13. That the petitioner was then compelled for the want of means of living, temporarily to abandon his efforts to obtain his rights; and after nearly eleven years' service in the Army, entered the Marine Corps of the United States, and went to sea in August, 1869, in the war vessel Lancaster, and remained abroad in that service until June, 1872; entering which service as a private, he became secretary, and served the country with fidelity, zeal, devotion and intelligence, of which he has the highest testimonials, which he appends hereunto in evidence thereof; and keeping inviolate, during all that time, and to this day, his promise of perfect sobriety, made to the President, when his supposed resignation was annulled by revocation of the President's acceptance of that which was a nullity, because not the act of the petitioner, and because it had not been proven, and was not true that the condition had occurred on which it was to become his resignation.

14. That on the 31st of December, 1872, he applied to the Secretary of War, setting forth the facts of his case, and requesting a re-examination thereof, and restoration to the service; which petition, with the testimonials then thereto annexed, is herewith exhibited.

15. That on the 6th of February, 1873, the petitioner having received no reply to his petition, by letter of that date to the Secretary of War requested a reply; in answer to which, on the thirteenth of that month, the Adjutant-General of the Army informed him that the Secretary declined to entertain his request for either restoration or re-appointment to the Army; which letters are also herewith exhibited.

16. That on the 18th of February, 1873, the petitioner applied to the President for a renomination as captain in the Army, reciting the facts, alleging that he was entitled to his place in the Army, and asking the appointment as the only mode remaining in which justice could be done him; which application is also exhibited.

17. That on the 30th of August, 1873, in order to prepare for presenting this petition, to have adjudication of his rights, he by letter to the Adjutant-General of the Army requested copies: 1. Of a letter addressed by him at Sidney, Nebraska, in May, 1868, to L't-Colonel J. H. Potter, 30th Infantry, empowering him under certain conditions to forward to the War Department a letter therein enclosed. 2. Of the letter therein enclosed, then without date, addressed by the petitioner to the Adjutant-General of the Army, and in said first-mentioned letter alluded to. 3. Of a letter of L't-Col. Potter, dated at Fort Sanders, W. T., in October, 1868, relating to the forwarding to the Adjutant-General of the two letters before mentioned. 4. Of the letter, endorsement or order of the President, Andrew Johnson, dated December 11, 1868, revoking his acceptance of said supposed resignation. 5. Of a letter addressed by the Secretary of War to the Attorney-General, dated January 4, 1869, forwarding papers in petitioner's case, and asking opinion thereon.

18. That on the 15th of August, 1873, the Adjutant General by letter to the petitioner, refused to furnish such copies, saying that it was contrary to the rules of the department to do so. Which letters to and from the Adjutant-General are herewith exhibited.

In consideration of all whereof, the claimant and petitioner, Bernard P. Mimmack, prays that he may be heard to prove his said case against the United States; and he demands against the United States, no other person being owner of or interested in any part of his claim therefor, as captain in the Army thereof, since the eleventh day of December, 1868,

and according to the pay account herewith exhibited, the sums following, that is to say:

To pay proper as captain of infantry, from 11th December, 1868, until 15th July, 1870:

19 months, 4 days, at $60 per month	$1,148 00
To one private servant, 19 months, 4 days, at $16 per month	306 13
To clothing for servant " " " $6.50 per month	124 36
6 To subsistence from December 11, 1868, until 15th July, 1870, to self (5 years' service), 581 days, at 5 rations per diem:	
To servant 581 days at 1 ration per diem, or 3,486 rations, at 30 cents	$1,045 80
To pay as captain of infantry (5 years' service) from 15th July, 1870, until Sept. 15, 1871, 14 months, at $165 per month	2,310 00
To pay as captain of infantry (10 years' service), from 16th Sept., 1871, to Sept. 30, 1873, 24 months, 15 days, at $180 per month	4,410 00
Being in all, up to 30th September, 1873	$9,344 29

and like pay ($180 per month) from that date until judgment rendered therefor.

And the petitioner prays that it may be by the court adjudged that he has never legally or in fact ceased to be a captain of infantry in the Army of the United States; and that he may have judgment against the United States for pay and allowances above demanded; and as in duty bound he will ever pray, &c.

B. P. MIMMACK.

PIKE & JOHNSON,
Counsel for Claimant.

Post-office of Albert Pike, Robert W. Johnson, and Bernard P. Mimmack Washington, D. C.

DISTRICT OF COLUMBIA,
City of Washington:

I, Bernard P. Mimmack, do solemnly swear that no assignment or transfer of the claim stated in the foregoing petition, or of any part thereof, has been made by me; that I am, as I do verily believe, justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I do verily believe all the facts therein stated, as the same are stated therein, to be true; and that, so far as stated as of my own knowledge, they are true in substance and in fact; and that I have at all times borne true alle-
7 giance to the United States, and have never in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States. So help me God.

B. P. MIMMACK.

Subscribed and sworn to before me this 1st of September, 1873.

R. J. MEIGS, *Clerk*,
By P. C. WILLIAMS,
Ass't Clerk.

ATTORNEY-GENERAL'S OFFICE,
February 10, 1869.

Hon. JOHN M. SCHOFIELD,
Secretary of War:

SIR: The facts of the case referred to me in your letter of the 4th ultimo, as collected from the papers transmitted therewith, are as follows:

In May, 1868, certain charges preferred against Capt. B. P. Mimmack, of the 30th Regiment of Infantry, "drunkenness on duty," being among them, were withdrawn, upon condition that he would place his resignation in the hands of General Augur, the department commander, to be forwarded to Washington in case he should again become intoxicated. Accordingly, on the 10th of that month, Capt. Mimmack transmitted to B'v't Brig. General Potter his resignation without date, authorizing General Potter to place it in the hands of General Augur, to be forwarded to the War Department should "he ever become intoxicated again."

On the 3d of October, 1868, General Potter reported to General Augur that Captain Mimmack had "again broke out drinking hard," &c.; and on the 5th of the same month General Augur forwarded the resignation of Mimmack to the Adjutant-General, recommending its acceptance. The resignation was accepted, and took effect on the 29th of October, 1868. But afterwards, on the 11th of December last, this acceptance of the resignation was revoked by the President. In the mean time, it is stated, the place made vacant by the resignation of Captain Mimmack has been filled by the advancement of First Lieutenant A. D. Palmer, who stood next in the line of promotion; but the nomination of Lieut. Palmer to that office has not yet been confirmed by the Senate.

Upon this state of facts, the following question is submitted for my opinion, whether the revocation by the President of the acceptance of the resignation of Captain Mimmack had the effect of restoring him to his former position in the military service.

This question, I think, must be answered in the negative. Upon the facts as stated, it is clear that there was a valid resignation and an unconditional acceptance of it; the concurrence of which operated
8 to remove the incumbent from his office in the military service, and nothing short of a new appointment could have the effect of restoring him to that office.

Cases, I am aware, have occurred in which a resignation and the acceptance of it by the President or other proper authority was not supposed to have been attended with such consequences. But in those cases it was held there were no valid and efficient resignations, and that the acceptance of the President or other proper authority was inoperative, and, therefore, capable of being recalled or withdrawn. In the case considered by Attorney-General Cushing (6 Opinions, 456), the officer was insane at the time he resigned, and when the President accepted his resignation. The action of the officer was held to have been a mere nullity, which could not be made valid by its acceptance. Again: In Kavanagh's case (10 Opinions, 229), M'r Attorney-General Bates held that an officer who was insane at the time his resignation was tendered and accepted, did not lose his office by reason of those acts, and that a reappointment was consequently unnecessary. And in the case of Lieut. Drane, M'r Crittenden held that where the War Department by mistake had treated a letter of the officer as a resignation, the error upon its discovery was capable of being rectified by the department. (3 Op., 641.)

These cases are peculiar and exceptional. The present case has no feature in common with them. The resignation of Captain Mimmack was voluntary, valid, and sufficient for the purpose intended. It was duly and regularly accepted by the proper authority. The effect which he intended it should have, it has had. He is now, and has been ever since its acceptance, out of the service as completely as if he had never been in it. He can only be restored to it by a new appointment made conformably to the Constitution.

I return herewith the papers received with your communication.

I have the honor to be, sir, very respectfully, your obedient servant,

(Signed) W'M M. EVARTS,
Attorney General.

A. G. OFFICE, *July* 27, 1869.

A correct copy.

Ass't Adj. General.

1327 "G" STREET,
Washington, D. C., 31st Dec., 1872.

To the Hon. the SECRETARY OF WAR,
Washington, D. C.:

SIR: I very respectfully and earnestly submit for your consideration the following facts relating to a wrong, under which, I believe,
9 and am instructed, I am now suffering from the action of the War Department in 1869.

In May, 1868, I, Bernard P. Mimmack, a captain 30th Infantry, and b'v't major U. S. Army, whilst under charges and to avoid the publicity of a trial by general court martial, placed my resignation in the hands of L't Col. J. H. Potter, 30th Inf'y, and b'v't brig'r gen'l U. S. A., to be forwarded only in the event of my becoming intoxicated. Some months later L't Col. Potter, acting on the information only of Lieut's Tomkins and Sheetz, 30th Inf'y (both my juniors in the regiment, and immediately affected by my resignation), caused my resignation to be forwarded to the War Dep't. No notice was sent to me that such action had been taken.

On Nov. 8th, 1868, I received the letter of the War Dep't, dated Oct. 9th, 1868, informing me that the President of the United States had accepted my resignation, to take effect that date.

As soon as the property, funds, &c., for which I was responsible, were turned over to my successor in command of my company, I proceeded to this city (Washington), and at an interview with the President stated my case to him, and on his reviewing the charges against me and examining into the facts, the case not coming under the provisions of the act approved July 20th, 1868 (G. O., § 58, series 68), the President on Dec. 11th, 1868, revoked his acceptance of my resignation; this, before my vacancy had been filled by any confirmation in the United States Senate.

After a sufficient time had elapsed, not receiving my orders to rejoin my regiment, I again applied to the President, and early in 1869 he again positively and decidedly reiterated the order revoking his acceptance.

I respectfully submit that the action of the President was in full conformity with an old established custom, one which had been exercised by many of his predecessors, by the late M'r Lincoln many times, and

by M'r Johnson himself in several instances; indeed, so fully was this course established that the Digest of Opinions, Judge Advocate General of 1866, contains a paragraph providing for such revocal.

Thus, at the time the acceptance was revoked, the highest law officer of the War Department affirmed the long existing right of the President in such course.

In January, 1869, the case was submitted by the War Dep't to the Attorney-General, with what endorsement I know not, but on Feb. 10th, 1869, the then Attorney-General gave an opinion adverse to the custom and usage of so long standing, and, on that opinion, my orders were denied me by the War Dep't, and I am yet without redress.

My means wholly failing me (from my long attendance awaiting orders), I was comp'lled then to abandon my efforts to obtain my right, a right as strong as that by which many officers now in both Army and Navy hold their rank, viz, the President's right of revocal.

My long service in the Army, about eleven (11) years, the best years in my life, had unfitted me for citizen employment, and I entered the U. S. Marine Corps, and in August, 1869, went to sea in the U. S. S. Lancaster, and remained abroad until June, 1872, which absence will account for the delay in my application for redress.

I now renew my request for orders to rejoin my regiment, as I cannot believe the opinion of any one law officer, biased as it may have been by an ex parte endorsement, can be sufficient to defeat the order of the President of the United States, when only exerting a right long used by his predecessors, and while it was an existing published condition recognized by the War Department.

My record in the Army I can proudly refer to. For a period of *of* over (10) ten years it is without a blemish. As non-commissioned officer before the late war, I was sergeant major of Fort Columbus, N. Y. Harbor, a position of no slight requirement. In the early days of 1861, my best efforts, night and day, were given to the rapid instruction, organisation, and forwarding of recruits to the various corps of the Army; in the fitting out of the Star of the West and other important and secret details of service. For my conduct and efficiency at this period of danger and treason I can refer to Lieut. Col. C. R. Woods, then 1st l't, all my commanding officers of that date being now dead or unattainable.

For my service as regimental adjutant 12th Inf'y, I refer to Col. H. B. Clitz, Major M. M. Blunt, B'v't Col. H. Y. Rathbone, late U. S. A., and to Professor R. S. Smith, now of the U. S. Naval Acadamy, Annapolis, M'd (then major 12th Inf'y), and respectfully suggest my record of service with my regiment in the Army of the Potomac throughout the war. I never applied for, or accepted, recruiting, mustering, or kindred duty until the war ended.

As captain 30th Inf'y (afterward 30th Inf'y), I served in this city during 1866; for my conduct then, appeal to Gen'l Auger, L't Col. Geo. W. Wallace, and to Brig. Gen'l F. T. Dent (then commanding district).

I served during 1867, and until October, 1868, upon the line of the Union Pacific Railroad; for my efficiency and promptitude, and for the best test of all, the condition of my company ("E," 30th Inf'y), its service, &c., refer to the reports of the acting ass't insp'r gen'l Dep't of the Platte. I cannot, I am sorry to say, for reasons not discreditable to myself alone, appeal to Brig. Gen. J. D. Stevenson, late U. S. A., or Brig. Gen'l J. H. Potter, 4th Inf'y (l't col.).

For my conduct in the United States Navy, the appended letters of Rear Admiral Joseph Lanman and Commander A. W. Johnson, U. S. Navy, will fully answer. I entered the Navy a private marine, I left it with the appointment of secretary, assimilating with my old rank in the Army.

11 My promise of perfect sobriety, made to President Johnson in 1868, has been faithfully kept.

My life has now been for the past fifteen (15) years fully and entirely devoted to the United States in all its armed services; my best years, efforts, and abilities have been given in their fullest effect to the Union; my whole ambition and purpose is to serve the flag again; and I confidently and earnestly request your examination into the facts above set forth, that if I am, as I hold, entitled to my rank, I may be so ordered as to redress the existing wrong; or, if not so entitled, some more conclusive evidence or decision by competent authority may be given me; not an opinion of an attorney-general on an unknown exhibit of my case, as opposed to long previous practice; in which event, should your sufficient decision be against me, I may ask your favorable consideration in applying for a renomination by the President of the United States.

Resting in the knowledge of your impartiality and justice, I have the honor to be, sir, very respectfully, your obedient servant,

B. P. MIMMACK.

CITY OF WASHINGTON, D. C.,
Sept. 28th, 1872.

I have known M'r B. P. Mimmack since 1869. Through a cruise of nearly three years he served with myself on board the U. S. flagship Lancaster, first in the Marine Corps as private and non-commissioned officer, and later as rear-admiral's clerk and secretary.

I saw him almost daily during this interval, and can testify to his excellent moral character; his temperate and industrious habits, faithfulness in the discharge of his duties in each position, his general intelligence, and his correct gentlemanly deportment.

(Signed) A. W. JOHNSON,
Commander U. S. N., late Ch'f of Staff, S. A. Fleet.

NORWICH, CONN., *October 20th*, 1872.

It affords me pleasure to state that M'r Bernard P. Mimmack was, the early part of the year 1871, appointed clerk to the commander-in-chief of the "South Atlantic fleet," and served in that capacity until the 18th of June, 1872, the date of being detached from my command. During that time, to the best of my knowledge and belief, the conduct of M'r Mimmack was perfectly correct, and in every respect unexceptionable to me, both as an officer and gentleman.

From the 15th Oct., 1871, until 18th June, 1872 (being that time without a secretary), M'r Mimmack performed all the duties that would be required of a secretary, in the most satisfactory manner.

(Signed) JOSEPH LANMAN,
R. Admiral U. S. Navy,
(late) in command of South Atlantic Fleet.

12 EXHIBIT C.

1327 G STREET,
Washington, D. C., February 6, 1873.

Hon. W. W. BELKNAP,
Secretary of War:

SIR: I have the honor very respectfully to request a reply to my communication of Dec. 31, 1872, in which I asked your consideration of facts relating to my resignation from the United States Army, and the subsequent revocal of acceptance.

Knowing the pressure upon your valuable time, I have avoided personal importunity, but should be glad of an answer at early convenience.

I am, sir, your obedient servant,

B. P. MIMMACK.

EXHIBIT D.

WAR DEPARTMENT,
Adjutant General's Office, Washington, D. C., Feb. 13, 1873.

M'r B. P. MIMMACK,
Late Captain 30th U. S. Infantry,
1327 G *Street, Washington, D. C.:*

SIR: In answer to your letter of the 7th instant requesting a reply to your letter of December 31, 1872, in which you ask to be restored or reappointed to a position in the army, I have respectfully to inform you that the Secretary of War declines to entertain your request for either restoration or re-appointment to the Army.

Very respectfully, your obedient servant,

E. D. TOWNSEND,
Adjutant-General.

EXHIBIT E.

NO. 1327 G STREET,
Washington, D. C., February 18, 1873.

To his excellency ULYSSES S. GRANT,
President of the United States:

SIR: My resignation as captain 30th Infantry, U. S. Army, was accepted by then President Johnson, to date October 29th, 1868, and on December 11th following M'r Johnson revoked his acceptance, and instructed the War Department that I should be ordered to rejoin my regiment. This, before the vacancy caused by my resignation had been filled by any confirmation by the United States Senate.

This action on the part of the President was in conformity with a custom of very long usage—the same procedure of M'r Lincoln and M'r Johnson having been effective in continuing in service many officers yet in the Army and Navy of the United States.

13 But, in my case, the War Department submitted the action of the President to the consideration of the Attorney-General, who, on February 4th, 1869, gave an opinion adverse to the power of the Executive to revoke his acceptance.

On this opinion, given nearly two months after the President's revocal, the War Department (making it ex post facto) refused my orders to rejoin my regiment.

Recently (December, 1872), I have applied to the War Department for redress, and am informed that the honorable Secretary declines to entertain my request.

As far as the executive act can place me, I am as much entitled to my rank as many officers now in both the U. S. Army and Navy, they holding their commissions after a revocal of acceptance of their resignations by previous Presidents.

Failing to obtain redress at the War Department, it only remains to me to ask your excellency to carry out the evident intention, or indeed the act of your predecessor, by giving me the nomination of captain of infantry to fill the next-occurring vacancy.

This appears to be now the only method by which I can receive my right under the action of Mr. Johnson, and indeed under the custom and usage of the Presidents, in like cases, since the foundation of this Government.

I make this appeal for justice. I have no political influence to exert to press or forward it.

My record as a soldier is, for ten years, without a blemish. The enclosed letters will account for the delay in this application, and vouch for my conduct and service since 1869.

Earnestly requesting your favorable consideration, I am your excellency's most obedient servant,

B. P. MIMMACK.

EXHIBIT F.

1327 G STREET,
Washington, D. C., Aug. 13, 1873.

The ADJUTANT GENERAL, *United States Army:*

SIR: I very respectfully request that I may be furnished at your early convenience with certified copies of the several letters and endorsements thereon relating to the termination of my service with the U. S. Army in 1868, especially the following, viz:

Copy of a letter addressed by myself to L't-Col. J. H. Potter, 30th Inf'y, and dated Sidney, Neb., May, 1868, empowering him to forward to the War Dep't a letter therein enclosed, under conditions.

Copy of a letter addressed by myself to the Adj't-Gen'l of the Army, (then) without date, and alluded to in the letter before mentioned as enclosed.

14 Copy of a letter of L't-Col. Potter, dated Fort Sanders, W. T., Oct., 1868, relating to the forwarding to the Adj't-Gen'l the two letters before mentioned.

Copy of a letter, endorsement, or order of Andrew Johnson, then President of the U. S., dated Dec. 11, 1868, and revoking his acceptance of a resignation in my case.

Copy of a letter addressed by the Hon. Sec. of War, dated Jan. 4, 1869, to the Attorney-General of the U. S., forwarding papers in my case, and asking the Att'y-Gen's opinion thereon.

I have the honor to be, sir, your obedient servant,

(Signed) B. P. MIMMACK,
(*Late*) *Capt. 30th U. S. Inf'y.*

EXHIBIT G.

WAR DEPARTMENT,
Adjutant-General's Office, Washington, Aug. 15, 1873.

M'r B. P. MIMMACK,
1327 *G Street, Washington, D. C.:*

SIR: Referring to your letter of the 13th instant, asking for copies of certain papers relating to the termination of your military service, I have respectfully to inform you that it is contrary to the rules of the department to furnish the copies asked for.

Very respectfully, your obedient servant,

E. D. TOWNSEND,
Adjutant-General.

EXHIBIT H.

Pay-account of B. P. Mimmack, as captain U. S. infantry, from Dec. 11, 1868, *until Sept.* 30, 1873.

To pay proper as capt. of infantry from 11th Dec., 1868, until 15th July, 1870, 19 months 4 days, at $80 per month	$1,148 00
For 1 private servant 19 months 4 days, at $16 per mo	306 13
" clothing " 19 " 4 " 6.50 "	124 36
" subsistence from Dec. 11, 1868, until 15th July, '70:	
For self (5 years' service) 581 days, at 5 rations per diem:	
" servant 581 " 1 " " or 3,486 rations, at 30 cents	1,045 80
To pay as captain of infantry (5 years' service) from 15th July, 1870, until Sept. 15, 1871, 14 months, at $165 per month	2,310 00
To pay as captain of infantry (10 years' service) from 16th Sept., 1871, until Sept. 30th, 1873, 24 months 15 days, at $180 per month	4,410 00
	9,344 29

15 In the Court of Claims of the United States. December term, A. D. 1872.

BERNARD P. MIMMACK
vs.
THE UNITED STATES. } No. 7839.

And now comes the Attorney General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of nine thousand three hundred and forty-four dollars and twenty-nine cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney General.

Filed Nov. 10, 1873.

16 In the Court of Claims.

BERNARD P. MIMMACK
vs.
THE UNITED STATES. } 7839.

At a Court of Claims held at the Capitol in the city of Washington, the 31st day of May, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

A true copy of record.

17 In the Court of Claims of the United States. Dec. term, 1874

BERNARD P. MIMMACK
vs.
THE UNITED STATES. } No. 7839.

The claimant, Bernard P. Mimmack, comes and prays the court to grant him an appeal from the judgment in this case rendered against him to the Supreme Court of the United States.

BERNARD P. MIMMACK,
By PIKE AND JOHNSON,
Of Counsel.

Filed Aug. 23, 1875.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

18 United States Court of Claims.

BARNARD P. MIMMACK
vs.
THE UNITED STATES.

The petitioner claims pay as a captain in the Army from the 11th of December, 1868, until judgment rendered here.

And the court find the fact to be:

That in May, 1868, the petitioner was a captain of the Thirtieth Regiment of Infantry and brevet major, station d and on duty at Fort Sidney, in Nebraska, which post, with others, was under the command of General Potter.

Previous to the 10th of May, charges, with specifications, of drunkenness on duty, &c., were preferred to General Potter against the petitioner, and he then said that, on condition the charges should not be acted upon, he would place his resignation in the hands of General Potter, to be held by him, and not forwarded to the War Department, if he should entirely abstain from the use of intoxicating liquors; and on the 10th of May the petitioner inclosed his resignation to General Potter in a letter, stating that the resignation was without date, and authorizing General Potter to place it in General Augur's hands, to forward to the War Department, should he, the petitioner, ever become intoxicated again. And General Potter sent the resignation and letter of the petitioner to General Augur, and informed him of the understanding had with the petitioner, and above stated.

Previous to October 3, 1868, the petitioner was again intoxicated on duty, and was by excess in drunkenness confined to his bed in a state

bordering on delirium tremens, and General Potter placed him under arrest, and ordered him to turn over the company's property in his hands. And, by letter dated October 3, 1868, General Potter informed General Augur that the petitioner had again broke out drinking hard, and that he had placed him under arrest, and ordered him to turn over the company-property.

On the 5th day of October General Augur forwarded the petitioner's resignation, with the date filled up by "October 5, 1863," to the War Department. This date was not filled up by the petitioner, nor was he informed of the communication by General Potter, nor of the fact that his resignation was to be forwarded to the War Department.

On the 29th day of October, 1868, the resignation of the petitioner was accepted by the President, to take effect from that date, and notice of the acceptance of that date was sent to the petitioner and received by him November 8, 1868. That the President, at the time of accepting it, had been informed of the manner in which it had been lodged with General Potter, or of the fact that the date had been filled in by a third person, or of any of the circumstances connected with the resignation, was not shown.

On the 18th of November, 1868, the President promoted First Lieut. Appleton D. Palmer to be "captain in the Thirtieth Regiment of Infantry," "vice Mimmack, resigned," and notice thereof was sent by letter to Captain Palmer, of that date, but he was not then commissioned.

On the 8th of December, 1868, First Lieut. Appleton D. Palmer was placed on the list of nominations made by the President to be sent to the Senate.

On the 11th of December, 1868, the President, on the peti-
19 tioner's application, revoked his acceptance of the resignation of the petitioner, and ordered him to duty, and notice thereof was given to the Secretary of War.

On the 12th of December, 1868, a report was made to the President of the facts of the case by the War Department, and on the 24th of December, 1868, the report was returned to the Secretary of War by the President for action under the order of December 11, 1868.

The report and the direction of the President were referred to the General of the Army, and he requested that, before an order was issued, the opinion of the Attorney-General might be obtained as to the legality of the President's revocation of his acceptance of the petitioner's resignation.

On the 30th of December, 1868, by the direction of the President, the name of First Lieut. Appleton B. Palmer was stricken from the list of nominations made by the President to be sent to the Senate, and the Secretary of War was notified thereof.

On the 4th day of January, 1869, the case of the petitioner, with the papers relating thereto, were submitted by the Secretary of War to the Attorney General, who, on the 4th day of February, 1869, gave it as his opinion that the President's revocation of his acceptance of the petitioner's resignation had not the effect of restoring him to his former position in the military service.

On the 13th of February, 1868, the opinion of the Attorney-General and the papers containing the President's order were sent to the General of the Army, and he declined to permit his name to be used in promulgating the order, as in his opinion it was illegal, and he was sustained in that by the opinion of the Attorney-General.

On March 11, 1869, President Grant nominated First Lieut. Appleton D. Palmer to the Senate as follows:

"WASHINGTON, *March* 11, 1869.

"To the Senate of the United States:

[Extract.]

"I nominate the officers herein named for promotion in the Army of the United States:

"THIRTIETH REGIMENT OF INFANTRY.

"First Lieut. Appleton D. Palmer, to be captain, October 29, 1868, vice Mimmack, resigned.

* * * * * * *

(Signed) "U. S. GRANT."

"NOTE.—These officers received, during the recess of Congress, letters of promotion, giving them the rank for which they are above nominated.

"President Johnson, however, directed that their names should be struck from the list of nominations, as he had ordered the restoration of Captain Mimmack, by whose resignation the vacancy had been created entitling them to promotion.

"This order of the President, upon being submitted to the Attorney-General, was decided by him to be illegal; and for the purpose of securing these officers in the rank they have already been given, and in which they would, without doubt, have been confirmed but for the order above enumerated, their names are submitted for the action of the Senate."

By letter of May 4, 1869, from the War Department, Lieutenant Palmer was notified of this promotion, but it was not acted on by the Senate.

And on the 6th of December, 1869, the President nominated to the Senate Lieutenant Palmer for promotion, as follows:

"WASHINGTON, *December* 6, 1869.

"*To the Senate of the United States*:

[Extract.]

"I nominate the officers herein named for promotion in the Army of the United States.

"THIRTIETH REGIMENT OF INFANTRY.

"First Lieutenant Appleton D. Palmer to be captain, October 29, 1868, vice Mimmick, resigned.

* * * * * * *

(Signed) "U. S. GRANT."

"NOTE.—During the recess of Congress, November 18, 1868, letters of promotion were issued to these officers, giving them the rank for which they are now nominated, and their names were submitted to the President, to be sent into the Senate, December 8, 1868.

"On December 30, 1868, President Johnson directed that their names should be struck from the list of nominations, as he had ordered the restoration of Captain Mimmick, by whose resignation the vacancy had been created entitling them to promotion.

"This order of the President, upon being submitted to the Attorney-General, was decided by him to be illegal; and for the purpose of securing the officers in the rank they have been already given, and in which, without doubt, they would have been confirmed but for the

order above mentioned, their names are submitted for the action of the Senate.

"On March 11, 1869, a new nomination, with a statement of the facts, was prepared; but as the Senate failed to take any action, it is not known whether it ever reached that body."

And thereupon the Senate acted as follows:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES,
"*December* 22, 1869.

[Extract.]

"*Resolved*, That the Senate advise and consent to the appointment of the following-named persons, agreeably to their nominations respectively, viz:

21 "FOR PROMOTION IN THE ARMY OF THE UNITED STATES.

"*Thirtieth Regiment of Infantry.*

"First Lieutenant Appleton D. Palmer, to be captain, October 29, 1868, vice Mimmick, resigned.

* * * * * * *

"Attest:
(Signed) "GEO. C. GORHAM,
"*Secretary.*"

On the 19th of February, 1869, the petitioner enlisted in the Marine Corps, and served therein until the 27th August, 1869, when he was transferred to the United States ship Lancaster, and served as clerk, and then secretary to the commanders of squadrons to May 22, 1872; and in the time specified he received as pay $2,344.09.

On the 2d November, 1872, the petitioner was appointed a clerk in the Second Auditor's Office, and served therein till August 16, 1873, when he was appointed a clerk in the Fourth Auditor's Office, and up to June 30, 1874, he had received pay as clerk as aforesaid to the amount of $2,082.49.

The court find that the revocation by the President of his acceptance of Captain Mimmick's resignation, after notice to him of such acceptance, did not restore the petitioner to his post in the Army.

The judgment of the court is that the petition be dismissed.

And we find, as a conclusion of law, that the revocation by the President of his acceptance of Captain Mimmick's resignation after notice received by him of such acceptance did not restore the petitioner to the Army.

LORING, J., delivered the opinion of the court:

On the facts found a majority of the court are of opinion that the petitioner's resignation was by him placed in the hands of General Potter to be acted upon in the circumstances which occurred exactly as it was acted upon, and, therefore, that the resignation was made by the petitioner's authority, as precisely as if he himself had delivered it to the President. The petitioner had motive enough for the arrangement he made, and made it advisedly and for his own benefit, and it was as competent for him to authorize General Potter or any one else to send in his resignation as it was for him to send it in himself.

The legal question in the case is whether the President can revoke his acceptance of an officer's resignation after the officer has received notice of such acceptance.

Between private persons, as corporations and individuals, offices are merely contracts of agency, and subject to the rules and incidents that belong to such contracts; and in their administration all that is to be regarded is the intent of the parties, and in these civil offices, where a resignation is made and accepted, it takes its effect from the assent of the parties, and it may, by the like assent, be thereafter revoked or modified at their pleasure, so long as they do not affect third parties, and to that effect are the common-law authorities cited for the petitioner.

But in the Army the rules are different because their purpose is different, and that purpose is the systematic organization of a large body of men; and for this the fixed rules and the strict adherence to such rules are required, which will produce throughout the organization 22 that certain and uniform action which belongs to a machine, and hence the rules and articles of war, and the statutes prescribing them, make a system of law entirely foreign to the common law.

By the general rule of the common law a resignation made and accepted is a completed transaction, for then the minds of the parties have met, and the legal consequences of their mutual assent follow. Therefore, if the mayor of a city sends in his resignation to the aldermen, and they, in the due exercise of their authority, accept it, the official life of the mayor thereupon ceases, and without more, and equally whether the mayor knows of the acceptance of his resignation then or never, and this is the reason of the common-law decisions, cited to us by the counsel for the petitioner.

But the statute of August 5, 1861, section 2 (12 Stat., p. 316), makes a different rule for our Army, and fixes definitely the time when and the means by which an officer shall cease to belong to the Army, and to be subject to military rules and orders; and thus purposely and carefully prevents the effect the common law would give to an officer's resignation and its acceptance by the Executive.

The section of the statute cited is as follows: "Be it enacted, &c., That any commissioned officer of the Army, Navy, or Marine Corps who, having tendered his resignation, shall, prior to due notice of the acceptance of the same by the proper authority, and without leave, quit his post or proper duties with the intent to remain permanently absent therefrom, shall be registered as a deserter, and punished as such." And article 5, placitum 24, of the Army Regulations follows the language of the statute.

By the provisions of this statute, after an officer has sent in his resignation, and it has been accepted by the President, the officer is still a member of the Army, and subject to military law and orders, until he has recived such notice of the acceptance, be that a longer or shorter time. And by absolutely necessary implication, when the officer has received such notice of the acceptance of his resignation, he is no longer subject to military law or orders, and, therefore, then is no longer a member of the Army.

The statute, therefore, departs from the common law, and changes the military law previously existing, by making the receipt of notice of the acceptance of an officer's resignation necessary to his discharge from the Army. And at the same time it necessarily makes uch notice of the acceptance of his resignation efficient for his discharge from the

Army; for upon the receipt of such notice, he is free to go where he pleases, and is without more absolutely discharged from military law and orders. And that effect is the intent of the statute. And every effect of a statute is a fixed effect, and cannot be altered or qualified by the Executive in any way or degree, for if it could be in any, it might be in all, and the Executive migt nullify the statutes.

Now the facts are found that the President accepted the resignation of the petitioner, and that he received notice of such acceptance on the 8th of November, 1868. And we think that on the receipt of such notice he was then, by the force of the statute, discharged from the Army as completely as if he had never belonged to it; and that such intent and effect of the statute could not be set aside by the President's subsequent revocation of his acceptance; and that the President could not, of his own authority merely, restore the petitioner to the place in the Army from which he had been discharged by a statute.

It is stated in the finding of facts that it was not shown "that the President, at the time of accepting the petitioner's resignation, had been informed of the manner in which it had been lodged with General Potter, or of the fact that the date had been filled by a third person, or of any of the circumstances connected with the resignation. And this merely means that as to all this there was no evidence whatever. But there was nothing in the evidence to suggest any concealment of the facts of the case from any one acting in it, or that anything was done by General Potter, or any one else holding and transmitting the petitioner's resignation, which he had not fully authorized.

23

The judgment of the court is that the petition be dismissed.

NOTT, J., concurring:

I do not disagree so much from the practical conclusion which the majority of the court have reached as from the principles upon which the decision is allowed to rest.

It is the fundamental law of the United States, declared by its highest judicial tribunal, that the legislative, executive, and judicial departments of the government shall be, each in its sphere, independent of the others (Klein's case, 7 C. Cl's R., p. 240), and, in the language of the Supreme Court, "it is of vital importance that these powers be kept distinct." The decision in this case, I think, trends upon the proper sphere of the Executive, and attempts to draw within the jurisdiction of the judiciary those matters which the Constitution places exclusively within the control and judgment of the President.

The decision of the court rests upon the premise that an officer of the Army had resigned, that his connection with the Army had been severed by the acceptance of his resignation, and that the judiciary may pass upon the legality of the method by which he was restored to the service. But this assumption involves the entire legal consequences of the case. Whether an officer of the Army has resigned or has not resigned, is a question which the judiciary cannot try. A certain piece of paper is indeed before the court, bearing the appearance of a resignation; but whether it was such or not, the President alone could decide. The Constitution and the laws thereunder relating to the Army leave the determination of that question exclusively with the Executive, and the judiciary must take the fact as he decides it to be.

It is conceded that if the President should accept a resignation in form, which was not a resignation in fact, he might revoke his accept.

ance and restore the officer to his position. If the presumed resignation were a forgery or the writing of one actually insane, no one disputes but that the President might undo that which he erroneously did. Conversely, if the President should refuse to annul his acceptance, I apprehend that no one would say that the judiciary could inquire into the matter, and hold the resignation a nullity and the acceptance void, and the officer still in the service. But these admissions are only another form of saying that the President is the exclusive judge of what is and of what is not a resignation.

And that is the question involved in this case. A paper was left in escrow with an officer. In form it was imperfect and incomplete. The holder was authorized to perfect it in a certain contingency, and transmit it for the Executive's action. Before it could become a resignation—that is to say, the legal act of the person executing it—those specified conditions had to be complied with. It was transmitted to the President. The blank in it had been filled. The contingency was said to have happened; but whether all of this was so, and whether it in fact became a resignation, are issues which no court of law is authorized to try. Those issues were submitted to the only power
24 having authority to deal with them; and that power, in fact, determined that the resignation was no resignation, and that the previous acceptance was error, and should be annulled. Can the judiciary now assume to try the question whether the President erred in his judgment? Can it decide that, in the matter of an officer's connection with the Army, its judgment is better than that of the Executive?

The legal peculiarity of the military service is, that whoever enters it cuts himself off, so far as profession and calling are concerned, from judicial redress, and indeed from all civil rights. He cannot go or come where he would; his time, his preferment, his compensation, his liberty, and indeed his life, are subject to the disposal of one man. No courts *which* are open to him as a soldier. His acquit'al by a court-martial is nothing until approved by the power above, and may be annulled and even reversed. Further than this, the President may also end his professional career by a word, and, by his simple order, dismiss him from the service. From a civilian's point of view, these powers are immense, and the surrender of these rights the severest hardship. But every one knows that this is the state of the case, and no one doubts that all of these powers are actually confided to the Commander-in-Chief.

And it is indispensable that this remain so. The judiciary can never undertake to determine these questions. It must take the status of an officer as it is left by the only power having the authority to determine it; and when, as in this case, that power decides that a resignation was not a resignation, and that its acceptance shall be revoked, the courts must receive that action as conclusive.

It is true that there is a statute which regulates resignations, and in effect declares that an officer shall not be out of the Army until his resignation has been accepted and he notified of it. But this statute does not affect the power of the President. Its design and purpose is merely to prevent an officer from severing his connection with the Army on his own motion. It keeps him in the Army until the President permits him to go out. It is also true that there is here a writable paper, in form and terms a resignation. But it appears at the same time aliunde the written instrument that the writer did not deliver it to the President, and that without the happening of certain events, it in contemplation of law never was delivered. It was not a forgery, it was

not the writing of a lunatic, it was not procured by duress, it was not stolen from the officer's trunk, and yet there was something to be determined before it became the officer's obligatory act. That extrinsic fact had to be determined by somebody, and that somebody was the President, and it was lawful and eminently just for him to allow the officer a hearing in regard to it.

Taking this case as I find it—that is, taking the status of the officer as the President has declared it to be—I find that Captain Mimmack did not resign in May, 1868, and that on the 24th December, the day of the President's final act of revocation, he was still a captain in the 13th Regiment of Infantry. Pursuing the inquiry, I find, by the action of the President, that on the 6th day of December, 1869, he ceased to be an officer in the service. It is true that the President did not then in form dismiss him, but the President might have done so, and his decision that Captain Mimmack was not then in the service bound Captain Mimmack and binds this court.

It was urged by the claimant's counsel that the object of the suit was to establish the fact that Captain Mimmack has been and still is an officer in the Army. I fully agree with the majority of the court
25 that no such suit can be maintained, and that no such question can be tried here. Neither under the statute conferring our jurisdiction, nor in any court of the common law, nor in any proceeding by the petition of right, was it ever heard that a man could bring his action against the government or against the Crown to obtain possession of an office. As regards certain civil offices, one individual may bring an action against another individual for ouster, but never has it been supposed that any person could bring such an action against the state. The position of the claimant, and the position of the majority of the court, though at variance, both singularly rest upon the same foundation, and that is, that the judiciary can assume the powers of the Executive, and determine whether an individual holds or does not hold a military office. For the same reason that I dissent from the majority of the court, I decide against the demand of the claimant.

26 In the Court of Claims.

BERNARD P. MIMMACK
vs.
THE UNITED STATES. } No. 7839.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon; of the application of the attorney for claimant for the allowance of an appeal, as filed in the clerk's office August 23, 1875, and of the order of the chief justice of said court allowing the same; of the finding of facts by the court and the conclusion of law thereon; of the opinion of the court, and of the concurring opinion of Judge Nott.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this day of .

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 334. Bernard P. Mimmack, appellant, vs. The United States. Court of Claims. Filed 24th December, 1875.

In the Supreme Court of the United States.

No. 73.

BERNARD P. MIMMACK

Vs.

THE UNITED STATES OF AMERICA.

Appeal from the Court of Claims.

Brief for Appellant.

ALBERT PIKE,
LUTHER H. PIKE,
Of Counsel.

Judd & Detweiler, Printers.

Supreme Court of the United States.

TERM OF 1878-1879.

No. 73.

BERNARD P. MIMMACK,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

This was a suit in the Court of Claims, to recover arrearages of pay and allowances due to the petitioner as a captain of infantry in the army of the United States.

POINTS OF FACT.

1. In May, 1868, the petitioner was a captain and brevet major of the 30th infantry, stationed and on duty at Sidney barracks in Nebraska, which post, with others, was under the command of General Potter. (Record, 12.)

2. Previous to the 10th of May, charges and specifications of drunkenness on duty were preferred to General Potter, against the petitioner. (Record, 12.)

3. On the 10th of May he drew up a letter of resignation, *without date*, addressed to the Adjutant General of the army, saying, "I have the honor, very respectfully, to tender my

resignation as captain 30th U. S. infantry and brevet major United States army." This he enclosed to Bvt. Brig. Gen. J. H. Potter, commanding Fort Sedgwick, Colorado Territory, saying, "I enclose herewith my resignation as cap- 30th U. S. infantry and brevet major U. S. army." It is without date, and I authorize you, at any time, to place it in Maj. Gen'l Augur's hands, to forward to the War Department, should I ever become intoxicated again." (Record, 12.)

4. On the 3d of October, 1868, General Potter enclosed and transmitted to the Assistant Adjutant General, headquarters, Department of the Platte, at Omaha, copies of the resignation and letter mentioned above, saying that the originals had been placed in the hands of the major general commanding the Department of the Platte; and adding, "I request that the resignation of Major Mimmack be forwarded to the Adjutant General of the army, *and of this date*, as Major Mimmack has violated the promises given when his resignation was deposited in my hands." (Record of Court of Claims, 22.)

5. The resignation, as now found on file, bears date the *fifth* of October. As General Potter's letter transmitting it is dated the third, and requests its transmission "*as of this date*," the date was inserted, not by him, but by some one, probably the Assistant Adjutant General at Omaha, after General Potter had handed the original to the general commanding. (Record of Court of Claims, 21.)

6. Captain Mimmack was not informed of the communication of General Potter, nor that the paper drawn up by him and placed in the hands of General Potter was to be forwarded, or was forwarded to the War Department. (Record, 13.)

7. On the 29th of October, 1868, President JOHNSON ac-

cepted what purported to be Captain Mimmack's resignation, knowing nothing more of the matter than appeared on the face of the paper. (Rec., 13.)

8. Notice of the acceptance of his resignation, to take effect from 29th October, 1868, was received by Captain Mimmack on the 8th of November, 1868. (Rec., 13.)

9. On the 18th of November, 1868, the President, by letter of appointment, promoted First Lieut. Palmer to be captain in the place of Mimmack, resigned, and notice of his appointment was sent to him. (Rec., 13.)

10. On the 8th of December, 1868, the name of Lieut. Palmer was placed on the list of nominations made by the President to be sent to the Senate. (Rec., 13.)

11. On the 11th of December, 1868, the claimant had applied to the President to revoke his acceptance of his supposed resignation, and on that day the President did revoke it, and order that he should be returned to duty. On the 12th of December, 1868, the Adjutant General reported that there was no vacancy in the grade of captain in the 30th infantry to which he could be restored. The reason for this conclusion was that his supposed resignation took effect from the 29th of October, and Lieut. Palmer, who was first entitled to promotion, had been promoted to the vacancy, by letter of appointment, dated November 18, 1868, (Rec. of Court of Claims, 29), "to be captain *vice* Mimmack, resigned." (Rec. of Court of Claims, 22.)

12. On the 24th of December, the President directed the execution of his first order, but his subordinate, the General of the Army, made an endorsement on the order, expressing the opinion that there was no place to which Captain Mimmack could be reinstated, and asking that the question might be submitted to the Attorney General. (Rec., 13.)

13. On the 4th of January, 1869, in a letter to the Attorney General, the Secretary of War recited the facts stated in the 11th point, and referred to an imaginary resolution of the Senate, adopted June 30, 1864, to the effect that an officer whose resignation had been duly accepted and had taken effect could not be restored without a new appointment, in conformity to the Constitution; and requested the official opinion of the Attorney General. At that time, as he stated, *the nomination of Captain Palmer had not been sent to the Senate.* (Rec. of Court of Claims, 22.)

14. No such resolution of the Senate is to be found.

15. It is not shown or pretended, that the President desired or directed that the opinion of the Attorney General should be asked for. The General of the Army declined to obey the order, made and reiterated, of the Commander-in-Chief, *and at his request the Secretary of War invited the opinion of the Attorney as to the validity of the order of the President, and the propriety of obeying or disobeying it.* (Rec., 13.)

16. On the 30th of December, 1868, by the direction of the President, the name of Lieut. Palmer, was stricken from the list of nominations made by the President to be sent to the Senate. (Rec., 13.)

17. On the 10th of February, 1869, the Attorney General, Mr. Evarts, gave his opinion. He stated the facts, "as collected from the papers transmitted" by the Secretary. One, *not* to be found in the papers mentioned by the Secretary as transmitted, is, that, in May, 1868, certain charges preferred against the claimant (drunkenness on duty being one,) were withdrawn on condition that he would place his resignation in the hands of General Augur, to be transmitted to Washington in case he should again become intoxicated. The blank resignation was, in fact, not placed in the hands of General Augur, but of General Potter.

And the Attorney General also stated that the resignation was accepted, and took effect on the 29th of October, 1868, and, also, that the *nomination* of Lieut. Palmer had not yet been confirmed by the Senate; but, in fact, as the letter of the Secretary stated, it had not been *sent* to the Senate.

Upon these supposed facts, the Attorney General decided that there was a valid resignation and an unconditional acceptance of it, "the concurrence of which operated to remove the incumbent from his office in the military service, and nothing short of a new appointment could have the effect of restoring him to that office." (Record of Court of Claims, 7.)

18. On the 13th of February, 1869, the opinion of the Attorney General and the papers containing the President's orders were sent to the General of the Army, *and he refused to promulgate the order, because in his opinion, sustained by that of the Attorney General, it was illegal.* (Rec., 13.) The President's revocation of his acceptance of what was not in law or fact the resignation of Captain Mimmack, and his reiterated orders that he should be placed on duty, were thus *annulled* by his subordinate, the General of the Army, without, so far as the record shows, the commander-in-chief having any information as to what was being done by those who were under his orders.

19. On the 11th of March, 1869, the General of the Army had become President, and nominated to the Senate Lieutenant Palmer, "to be captain, October 29, 1868, vice Mimmack, resigned." The Senate did not act on this nomination, and it was renewed on the 6th of December, 1869. (Rec., 14.)

20. On the 22d of December, 1869, this nomination was confirmed. (Rec., 14, 15.)

The findings of fact by the Court of Claims do not fully present the case, and are not altogether correct. For example, they state that, *before* any action by General Augur upon the resignation, was asked by General Potter, immediately after the latter received it, one must infer, the paper was sent to General Augur, and he was informed of the agreement. But that is incorrect. It was not sent to him until he was asked to forward it to Washington.

But if the decision of the main question is correct, the omissions and errors of the findings of fact are unimportant.

ASSIGNMENT OF ERRORS.

And the said Bernard P. Mimmack, lawfully captain of infantry in the Army of the United States, says, that in the record and proceedings aforesaid, and in the giving of judgment by the Court of Claims aforesaid, there is manifest error in this, to wit:

That the said Court of Claims did, as a conclusion of law, adjudge and decide, in the suit aforesaid, of him the said Bernard P. Mimmack against the United States, that the revocation by the President of his acceptance of the supposed resignation of the said Mimmack, after notice received by him of such acceptance, did not restore him to the army, as by the record aforesaid appears.

And there is also error in this: That the said Court of Claims did in said cause adjudge and decide that the said Bernard P. Mimmack did in fact resign his office of captain in the army of the United States, and that the paper signed by him, and pretended to have been his resignation, in the record and proceedings aforesaid set forth, was in law and fact his resignation; whereas the said Court should have adjudged and decided that the same was not his resignation, either in law or in fact.

There is also manifest error in this: That the Court of

Claims aforesaid, in giving the judgment aforesaid, in the cause aforesaid, did adjudge and decide that by the said paper coming to the hands of the President, and his acceptance of it as a resignation, and notice of such acceptance received by the said Bernard P. Mimmack, he ceased in law to be an officer in the army of the United States, and the question to be adjudicated was, whether he was afterwards lawfully restored; whereas the said court should have adjudged that the said Bernard P. Mimmack had never ceased to be such officer, and therefore could not be restored to that which he had not lost, nor again become what he had never ceased to be.

And there is also manifest error in this, to wit: that by the record and proceedings aforesaid it appears that the judgment of the said Court of Claims, in the cause aforesaid, in form aforesaid given, was of dismissal of his petition, given against the said appellant and in favor of the United States; whereas, by the law of the land, it should have been given in favor of the said appellant and against the United States, for the pay and allowances claimed.

Wherefore, and for other errors in the record and proceedings aforesaid appearing, the appellant prays that the judgment aforesaid, in form aforesaid given, may be reversed, annulled, and wholly held for naught, and that he may be restored to all things that he has lost by occasion thereof.

POINTS OF LAW.

1. The President had the power, the vacancy not having been filled, to revoke or recall his acceptance of the resignation, if we concede that the claimant did, by the paper in question, actually resign his office.

2. The law on the point decided by the Attorney General is directly the reverse of what he supposed it to be. "If a

man comes in an open assembly of the corporation, and there resigns his office, and declares that he will not continue in it longer, and desires them to accept his resignation, and they accept it, *and elect another in his room*, it is a good resignation. * * In London, the Aldermen send letters to acquaint the Lord Mayor and Court of Aldermen that they resign; *and if another be elected in their place*, it is a good resignation; *indeed they may revoke it before their place is supplied.*"

Ch. Baron Hale, in Rex *vs.* Mayor of Rippon, 1 Ld. Raym., 563.

S. C., 2 Salk., 433.

In the report in Salkeld, the decision is thus given: "And this declaration in a corporate assembly was held good, especially since the corporation accepted it, *and chose another in his place; but till such election he had power to waive his resignation, not afterwards.*"

Mr. Crispe, Common Sergeant of London said, that Sir Thomas Allen sent a letter, &c., that he resigned his place; but before another was elected, he came and disavowed it.

3. A military officer is *not* out of the service by the acceptance of his resignation. For, if he leaves his post *before he receives notice of it*, he is liable to the penalties of desertion.

12 Stat., 316.

4. In the case of a civil office, no acceptance of a resignation is necessary. It takes effect when received by the party to whom it is properly addressed. When made to the president, he cannot refuse to receive it.

The United States *vs.* Wright, 1 McLean, 509.

Gates *vs.* Delaware Co., 12 Iowa, 405.

People *vs.* Porter, 6 Cal., 26.

5. A *prospective* resignation is an *intention*, or at least a promise, to resign, and may be withdrawn before the time fixed; and *after* it is accepted, the party may withdraw it, by consent of the party accepting, where no new rights have intervened.

Biddle *vs.* Willard, 16 Indiana, 66.

6. The office of captain in the 30th infantry, supposed to have been resigned by Mimmack, had not been filled, when the president recalled his acceptance. Lieut. Palmer had received a letter of appointment, and had not been even nominated to the Senate. The letter of appointment did not make him a captain. He had not been nominated on the 10th of February, 1869, and was not nominated during the session of Congress ending March 4th, 1869. His appointment therefore expired by its own limitation, on the 4th of March, 1869, and after that, at least, there was and continued to be a vacancy, if there ever had been one.

7. The constitutional power of appointment has been exercised, when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. When a commission has been signed by the President, the appointment is made. The appointment becomes complete upon signature of commission.

Marbury *vs.* Madison, 1 Cranch, 137 ff.
United States *vs.* Le Baron, 19 Howard, 73.
United States *vs.* Bank of Arkansas, Hemp., 460.

8. The appointment of a paymaster is complete, when made by the President and confirmed by the Senate.

United States *vs.* Bradley, 10 Peters, 344.

9. The revocation of his acceptance of Mimmack's resignation by the Commander-in-Chief of the Army, and his

order that he should be returned to duty, recalled, of necessity, the letter of appointment of Lieut. Palmer, to act in his stead and as captain of his company.

No one can deny the power of the President to recall that appointment. He not only *did* recall it, by an order that necessarily annulled it, but he refrained from renominating Lieut. Palmer for promotion. He *could* not nominate him, after deciding, by his revocation of acceptance of Mimmack's resignation, that there was no vacancy.

10. Capt. Mimmack having been restored by the revocation, in fact, never having been out of the service, because by the revocation the acceptance was *non avenu*, made never to have been, his place never was lawfully filled, and he is entitled to his pay and allowances for the whole time.

11. The Attorney General said that the resignation was "voluntary, valid, and sufficient for the purpose intended." But it is very clear that there never was any valid resignation.

12. The resignation was not an escrow; because a deed is such only when its delivery is dependent on something to be done by the grantee. If the maker has a right to reclaim it, it is no escrow.

Fitch *vs.* Bunch, 30 Cal., 213.

See James *vs.* Vanderheyden, 1 Paige, 388.

13. Colonel Potter did not hold the paper given him by the claimant in his character of his superior officer, but merely as his private agent *pro hoc vice*. It was a mere promise to resign that could not be enforced—a mere nude fact, without consideration.

14. It cannot be argued by the Government that, as the claimant was charged with "drunkenness on duty," and gave his resignation to prevent being tried upon that charge,

he, in fact, pleaded "guilty;" and that as the punishment for that offence, if proven, is dismissal, he stands as though tried by general court martial, and, therefore, under the provisions of the joint resolution of July, 1868, the President has not the power of revocation.

15. The resignation was not placed in the hands of Col. Potter as an escrow. For when a deed so entrusted *is* delivered, on the occurrence or performance of that on which its delivery was to be made, it takes effect as of the day when it was made and deposited, even if both parties are dead.

Graham *vs.* Graham, 1 Ves. Jr., 275.

16. It was, therefore, nothing. A resignation is valid by virtue of the consent—the *present* consent—of the party who resigns. Here there was no consent of Mimmack. He *had* consented five months before that it should be his resignation, and be forwarded, if he should be guilty of a particular act. If that act was not an offense—the legal consequence of which was forfeiture of the office, the legal penalty cashiering or dismissal—the agreement was void for want of sufficient consideration.

17. The law that applies to a contract, enters into it and is a part of. An officer of the army holds his office on condition that if he becomes unworthy of it, as by being drunk on duty, he shall lose it by being cashiered or dismissed. But you must establish the fact that fulfills the penal condition by due trial and judgment. If he expressly contracts that he may be dismissed if in like manner guilty, can he be dismissed because his superior says "He is guilty: he has committed the act?" To ask the question is to answer it. If, then, he resigns, his resignation to take effect on the same condition, must not the offense be established in the same way?

18. If the President had *not* the power to recall his acceptance of a genuine resignation, he did have the power to decide that his acceptance was ineffectual, because there was, in fact, no resignation for him to accept. In favor of the validity of his action, the courts must presume that he exercised a power which he had, and not one which he had not.

19. When the claimant appealed to the President to recall the acceptance of his resignation, the whole matter was before the President. He had a right to hold that the paper transmitted was no more, in law, the resignation of Mimmack, than if he had been insane. In that case, the Attorney General admitted a revocation of acceptance was lawful. The presumption is that the President's revocation was based on that ground. It will at least be so presumed, if necessary to sustain it.

20. Mimmack is entitled to the benefit of the presumption that the President revoked his acceptance on the ground that there was no proof of the fact on which the paper was to become his resignation; that for want of such proof, there had been no resignation; and that he had accepted that which purported to be such, under a mistake: especially as it does not appear that Colonel Potter made the report on his own knowledge.

21. And even if that ground did not occur to him, and he recalled his acceptance without reference to it, still if the facts constituted a valid ground for his action, it was valid.

The President, when he accepted what he supposed was the resignation of Mimmack, had not been informed of the circumstances and manner under and in which it had been lodged with General Potter, or of the fact that the date had been filled in by a third person, or of any of the circumstances under which it had been sent forward.

He acted in total ignorance of all these things, and when they were brought to his knowledge, he deemed it proper to his office, and consistent with the public interests, to annul his acceptance, and promptly did revoke it.

This revocation, made upon full information, was the exact equivalent of a refusal to accept, predicated upon full knowledge of all those things of which he was ignorant at the time be made his acceptance.

22. Proof that Mimmack had been intoxicated again was not admissible under the pleadings. There is no issue on the question whether the condition had occurred. The United States pleads as it sees fit. If it chooses simply to deny what is alleged, it must abide the consequences precisely as an individual must.

23. If Mimmack did not resign, or if the President had the power to recall his acceptance of the supposed resignation, and therefore Mimmack continued to be a captain in the army, he could not be afterwards arbitrarily dismissed, either by express dismissal, or by the appointment of another in his place, on the ground that he had resigned, that his resignation had been accepted, and the attempt of the former President to recall his acceptance was null.

This by force and effect of the provisions of section 5, act of Congress approved July 13, 1866, U. S. Stat. at Large, vol. 14, page 92: * * * "And no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

24. A decision to that effect by the President, if erroneous, may be so declared by the courts, when the right to pay and emoluments depends upon it.

ARGUMENT.

UNDER POINTS 1 AND 2.

a. The Attorney General held that by the acceptance, the claimant ceased, *eo instanti*, to be in the military service, as completely as if he had never been in it. "The effect which he intended it should have, it has had," he said. *Aliquando dormitat.* The attorney decided without due consideration. His law is not good. He would have walked more safely and surely by the light of the authorities.

b. The Judge Advocate General has decided that such a revocation is not in the nature of a new appointment, and needs no renomination or confirmation by the Senate. (Digest. Opinions of Judge Advocate General, Ed. 1866, p. 210.)

c. In Montgomery *vs.* The United States, 5 Rep., 94, the Court decided that revocation by the President, of a summary dismissal by his order of a military officer, nearly a year afterwards, was valid. The Court held that "an order of the President dismissing a military officer may be revoked by the same President that issued it; and if the office be not filled at the time of revocation, and if the pay thereof has not been paid lawfully to another, the dismissed officer will be entitled to the office and to the pay, *ad interim*."

d. By such a dismissal, the officer was "as completely out of the service as if he had never been in it:" Certainly as completely so as when the President accepts a resignation. If "the effect that the party intended his resignation *should* have, it *has* had," when *accepted*, the effect that the President intended his *dismissal* should have, it *has* had.

e. The Court also held that if, at the time of the revocation, the office was filled by another, the revocation would

remain suspended until a vacancy should occur. In that case, the office had been filled, by a nomination confirmed by the Senate, and a commission ready for delivery. If the President could, nevertheless, revoke the dismissal, he surely could revoke his acceptance of a resignation. And the decision of the Judge Advocate General shows that such was the practice.

f. When a deed is duly executed and delivered, the title to the land vests in the vendee. "The effect that the vendor intended the deed *should* have, it *has* had:" and "he has ceased to be owner of the land as completely as if he never had been owner." An Attorney General could easily say that. But who doubts that if the vendor were to desire, and the vendee were willing, to cancel the sale, it would be enough to destroy or return the deed, and that no re-conveyance would be necessary.

g. On some such logic as that of the Attorney General, a Supreme Court of a State once and for a long time held that if the endorser of a note came again into possession of it, he could not strike out his endorsement and sue in his own name. He ceased to be owner of it, they said, by endorsing and passing it, and could be re-invested with the ownership, only by a re-indorsement. It was a very worthless logic. Is that of the Attorney General any better?

h. Suppose that the President and the General of the Army were to quarrel, face to face, and the General at last to say "I resign my office of General," and the President to reply "I accept it," and, a moment after, "No; I will not accept it; I recall and revoke my acceptance." If he could do it a moment after, he could do it a month after, two, three, six months after, if the office remained vacant. Then suppose that the Attorney were to say "You cannot revoke your acceptance, Mr. President. There has been a

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valid resignation, and an unconditional acceptance of it; the concurrence of which operated to remove General Sherman from his office in the military service, and nothing short of a new appointment can have the effect of restoring him to that office. The resignation of General Sherman was voluntary, valid, and sufficient for the purpose intended. It was duly and regularly accepted by the proper authority. The effect which he intended it should have, it has had. He is now, and has been, ever since its acceptance, out of the service as completely as if he had never been in it. He can only be restored to it by a new appointment made conformably to the Constitution." If the President and General were passionate men, the consequences to the Attorney General might be unpleasant.

i. Would his opinion be more patiently listened to, if the resignation, dictated by passion, had been in writing, and accepted in due form, and the acceptance revoked five minutes, or an hour, or a day, or a month afterwards?

j. I do not know any respectful term by which such an argument as that of the Attorney General can be aptly designated. There is in it neither remembrance of principle, nor logic, nor reason, nor legal subtilty, nor common sense. I should never have expected to find it uttered by a great lawyer like him. It is mere paltry clap-trap, a boldly false proposition, to which, it is true, a man who considers in his ignorance that the law has three great enmities—one against reason, one against justice, and the other against plain common sense—might gape at, as if it were the undeniable article of a creed, or a maxim of logic. I do not see how it could impose itself for truth on any reasonable mind. There is a striking contrast between its narrowness and sticking on the bark, and this decision of one of the ablest lawyers that the United States has produced:

"The revocation of an order accepting the resignation of an officer of the regular army is not in the nature of a new appointment, and upon such revocation the officer assumes his previous status and relative rank in his arm of the service, subject only to the loss of his pay and allowances for the period during which he was actually out of the service."

Opinions of the Judge Advocate General of the Army, Official Record, vol. xix, p. 307.*

Digest of Opinions, 328.

Digest of Opinions, edition 1866, p. 210.

UNDER POINT 4.

a. When *received*, the resignation of a civil officer, has precisely that finality which resignation of a military officer has, when *accepted;* for, in each case, nothing remains to be done. Yet it is common for such resignation of a civil office to be withdrawn, although it could equally be said of it, when received, that "the effect which the party intended it to have, it has had;" and that, by its receipt, as by delivery of a deed, "the party was as completely out of office, as if he had never been in it."

b. The Court of Claims says:

"By the general rule of the common law a resignation made and accepted is a completed transaction, for then the minds of the parties have met, and the legal consequences of their mutual assent follow. Therefore, if the mayor of a city sends in his resignation to the aldermen, and they, in the due exercise of their authority, accept it, the official life of the mayor thereupon ceases, and without more, and equally whether the mayor knows of the acceptance of his resignation then or never, and this is the reason of the

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*The Government objected to our having a copy of the original record of this decision, and the Court of Claims refused to call for it.

common-law decisions, cited to us by the counsel for the petitioner."

And then the court proceeds to argue that, because the statute makes *notice* received of acceptance of resignation, and not the acceptance itself, terminate the official life of the resigning officer, *therefore* it necessarily makes such notice "efficient for his discharge from the army." Thereupon the officer can go where he likes, is absolutely discharged; that effect is the intent of the statute; every effect of a statute is a fixed effect (O, sagacious judges!) and the Executive cannot alter or qualify it in the slightest degree.

That is mistaken for logic. The statute simply says, "the party shall not be out of office by the acceptance, but by being advised of it. The reception of notice of the acceptance shall have the effect which formerly the acceptance itself had." But the Court says, "*therefore* it has more. After that notice, the acceptance cannot be recalled." By what right is it said that it has this larger effect? By none, but the distressing necessity of finding a reason where there was none for a proposition that is concentrated nonsense.

"This is the reason," the Court says, "of the common-law decisions cited to us by the counsel for the petitioner." It does not account for these decisions. They are, that an acceptance of a resignation may be recalled, because the resignation may be, so long as the office is not filled by a new appointment. What the Court said is no reply to these decisions at all, and does not avoid them at all.

c. When Mr. Evarts was Attorney General, he had an unqualified right to resign his office at any moment. If he had written a positive resignation and handed it to the President, it would have taken effect instantly thereon, not needing any acceptance. Would Mr. Evarts have held that he could not, at the solicitation of the President, consent to take back the letter and retain the office, and that a reap-

pointment and confirmation by the Senate would be necessary? And yet, nothing more would be needed to be done to make the resignation complete, than that it should reach the hands of the President. The moment it did so, "the effect that Mr. Evarts intended it should have, it would have had," and "he would be as completely out of the office as if he had never been in it." It would only be necessary to that, that he should not consent to take it back.

d. If Mr. Evarts had lived in the days of Scævola, and had heard one Roman citizen say to another, "Dost thou sell to me and make mine this horse?" and the other had answered, "I do sell to thee and make thine this horse," he would have said, "that is a stipulation and promise. It is final and conclusive. The effect the stipulation and promise were intended to have they have had. The horse belongs to Varro, the stipulator. It can become Curio's again only by a new and solemn stipulation:" and this solemnly wise decision would have excited the admiration of the gaping peasant; but Scævola would have muttered, *O ineptiæ pæne aviles.*

UNDER POINT 11.

a. The paper purporting to be a resignation was forwarded without Mimmack's knowledge, without his consent given at the time. He had made a paper without date, purporting to be a present resignation, and given it to his superior officer, to be forwarded to the War Department in case *he should* EVER *become intoxicated again.* Five months afterwards it was dated and sent on, without notice to him, his superior stating that he had broken his promises; that he had "again broke out drinking very hard."

b. If this could be so used five months afterwards, it could have been so used ten years afterwards.

c. Becoming intoxicated again was not cause for cashiering or dismissal. Drunkenness *on duty* is. It was not reported that he had been drunk *on duty*. That is not involved in the statement that he had violated his promises. His promise was what was made the condition on which the paper was to be forwarded. That was, not to become intoxicated again. That he had "broke out drinking very hard" does not mean that he had been drunk while on duty. Consequently he agreed that his resignation might be forwarded, and it was forwarded, on his doing an act by which in law he did not forfeit his commission. If the condition had been, "in case I should ever smoke a cigar," or "drink a glass of liquor," or "play a game of whist, billiards or nine-pins," would the violation of the implied promise have warranted the sending on his resignation?

d. His resignation could not lawfully be exacted, except for a cause that was in law sufficient to forfeit his commission—cause of cashiering or dismissal.

e. Suppose, then, that it had been agreed that the resignation should be forwarded in case he should steal, swindle, lie, perjure himself, or commit adultery. That which is cause of forfeiture of a commission is a crime, and shameful, as much as these are. Could his superior have reported "I date and forward this conditional resignation, because he has picked a pocket," "stolen a horse," "obtained money by false pretences," "committed perjury," "been guilty of adultery?" When the condition of any forfeiture is the commission of a crime or violation of penal or military law, that the condition has occurred can be established only by trial and conviction. At least, the party must have notice of the charge, be permitted to meet the witnesses face to face, have opportunity to make his defence; and cannot be condemned on hearsay.

f. The pretended resignation was a temperance pledge, with an exorbitant penalty. General Potter could, with as much right, have had Mimmack hung, if he had held his agreement for that penalty, in case he should ever become intoxicated again.

g. It is not true that, if the resignation should take effect, by his becoming intoxicated again, it would have been by way of penalty for the former offence of being drunk on duty. It was to be the penalty for what he might do in the future. If he had never done so, it could never have been forwarded to Washington. It was an agreement for life. Surely it did not indefinitely suspend the charges.

h. When the resignation was forwarded the claimant did not assent to its being sent. Its transmission was not his act. He had agreed that it might be sent if he should *ever* become intoxicated again. Such a condition, to last all a man's lifetime, was void. If it had been valid, he could not be condemned unheard; and he could have at any time revoked the agreement contained in the paper, or rather, *evidenced* by it.

i. Who was to judge and decide that the condition had occurred—*i. e.*, that Mimmack had been drunk? Who knows that he had been? There is no proof of it. Potter *said* he had. Did he know? How? By the evidence of others, or by that of his own eyes? We do not know, except by the fact that he and Mimmack were at different posts. He decided and damned on hearsay and information, then!

j. The condition was not lawful, nor the agreement enforceable. No superior officer is at liberty to engage in the business of taking *such* pledges for good behavior. Imagine the General of the Army holding such, signed by all the officers in the service, and handing them in as resignations,

on his own mere statement that *all* had "broke out drinking very hard," and this based wholly on information from others.

k. No officer can have the right so to make "becoming intoxicated again" sufficient ground for forfeiture of a commission earned by honorable service. The condition is one neither fit for a gentleman to agree to nor for a gentleman to exact. An agreement that one's commission shall be forfeited by what befalls half the officers of the army now and then, and grave Senators, and even Presidents, and for which the law prescribes no such penalty, is a void agreement, utterly without consideration, *and Mimmack's could not have been* enforced if he had known anything about its being sent on, and had declared it not his resignation.

UNDER POINT 14.

a. In one case the offense is proven; in the other, it was only alleged, and charges were not yet even preferred. If the claimant admitted the offense, that admission could not have the effect of a conviction and sentence. A man not guilty may still desire to avoid the publicity of a trial, which always leaves some stain and sting behind.

b. The condition in question was a highly penal one, and therefore to be strictly construed. The paper was to be his resignation if he became intoxicated. It was not to become such if it should be *reported* or *said* that he had been intoxicated again. The latter is all that is proved to have happened. There is no proof that the former had occurred. He had and has always had the right to say, "I did not agree that the paper should be my resignation if one or more officers should inform Colonel Potter that I was drinking again, or if he should so report. I agreed to forfeit my commission if I should *do* so; and that made proof of my

offense necessary, and opportunity to me to be heard in my defense."

c. He had not, until long after this suit was commenced, ever even *seen* the letter to which the Attorney General refers as containing the charge. It was "contrary to the rules of the service" to furnish a party condemned and cashiered without a hearing with a copy of the charge or report on which he had been condemned!

d. And if the act was of a nature to forfeit his commission—was an offense, an act unbecoming an officer and gentleman—could the consequences of it be visited on the party merely on Potter's allegation, whether based on information or purporting to be on his own knowledge, without notice to the party accused and opportunity to be heard? The thing is simply monstrous.

e. Supposed it had been conditioned to take effect if he should fail to pay Potter a sum of money borrowed, or a gaming debt. When it was forwarded, he did not give his consent, and was not bound by the prior consent, unless actually proven guilty of the act named in the condition.

UNDER POINT 16.

a. A resignation may be conditional to take effect on the happening of a contingency or the doing the act by the party. The act may be or not be one which is in law cause of forfeiture of the commission—ground for cashiering. If the former, the resignation on condition simply agrees that *if* the party forfeits his commission, it *shall* be forfeited. It stipulates simply for the legal consequence of the offense. If the latter, it stipulates for an act that does *not* involve forfeiture of his commission—that disproportionate consequence,—and therefore more peremptorily re-

quires notice, hearing, trial and proof, before the penalty shall be inflicted.

b. If a deed of land were made, or a promissory note without date, and deposited as an escrow, to be delivered to the person named as grantee or payee, in case the maker should ever commit a forgery, or bet at faro, could the depositary deliver it upon information that the maker had done the specified act.

c. And it is even a stronger case, when the act, if committed, is to work forfeiture of office, rank, character and honor, a judgment

"*contra fortunam armati, contra pudorem.*"

UNDER POINT 22.

a. Without *alleging*, one cannot *prove*. The Government chooses to defend by a simple traverse, denying what the petition alleges. There are no other issues. Like others defending, it must plead properly, and abide by its pleadings. If, instead of admitting anything, when in fairness it ought to admit what its own records show to be true, it prefers to put the claimant to all the trouble possible, by a general denial, requiring him to prove everything that he alleges, it must abide the consequences of this mode of defense.

UNDER POINTS 23 AND 24.

a. The opinion of Mr. Justice Nott is, that Mimmack was not out of the service until the 6th of December, 1869, when the President, who, as General of the Army, had made nugatory the act of his Commander-in-Chief, decided

that he was not then in the service, by appointing another to fill the place made vacant by his alleged resignation. But, says Mr. Justice Nott, he did *not* resign in May, 1868, and he was still a captain on the 24th of December, 1868, and so continued to be until the 6th of December, 1869. But the President then decided that he was not in the service, and *therefore*, as he might have dismissed him, he was *not* in the service, but *had* resigned.

b. But the President had not the power to dismiss an officer in time of peace; and therefore the argument will not hold water.

Section 5, act of July 13th, 1866, 14 Stats. at Large, p. 92, above cited.

c. Nor was there then a resignation for the President to accept. The learned judge must have meant that the President could then reverse the action of his predecessor, and hold that Mimmack had resigned, and that the resignation having been accepted, the revocation of the acceptance was null.

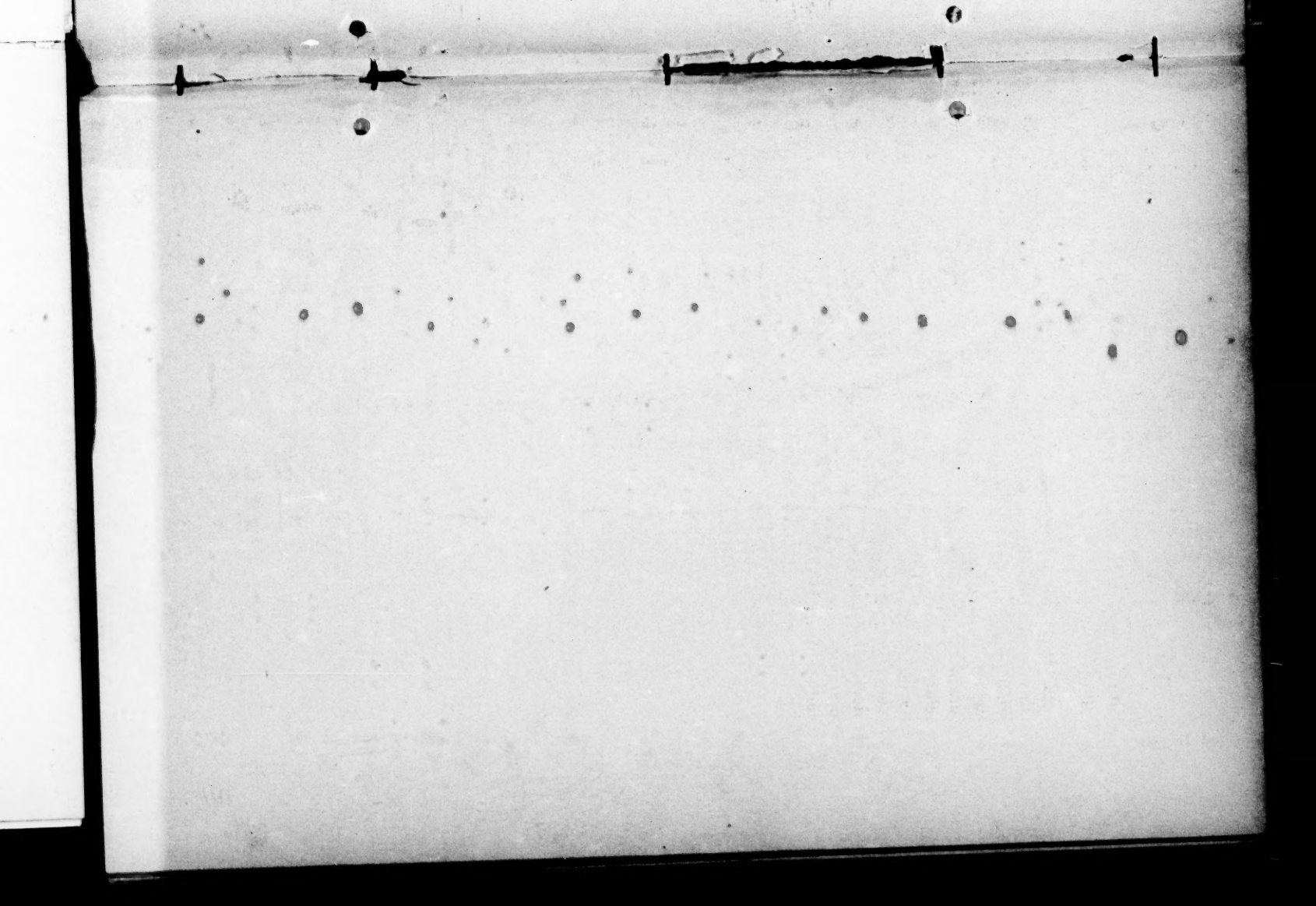
d. That is precisely what he did do. He appointed Captain Palmer from the 29th of October, 1868. He decided a question of law. And the question which this case presents is, whether his decision was right. The learned judge says that his decision binds this court. His decision and that of President Johnson are of equal dignity.

e. But when a legal question is so decided, an appeal to the judicial power remains. It would be monstrous to hold that decisions of military officers, or of the President as commander-in-chief, as to the status and rank of officers, are not to be reconsidered by the judicial authority. The President did not exercise a power as to which he could not be questioned. He decided a legal question, and acted upon the decision. The constitution and laws did not con-

stitute him a tribunal of last resort, to decide such questions.

f. It is quite true that the Court of Claims has not jurisdiction of a suit in which the principal purpose is to be reinstated in an office. But it has jurisdiction in any case where an individual has a claim for money against the Government upon a contract, and if, to determine whether *that* claim is valid, it must be inquired whether he is, in law, in or out of office, the court must decide that, according to the very law and right of the case, even if it has to review a decision of the President and deny his infallibility. It is certainly not necessary to argue that question, or to quote authorities to maintain it.

ALBERT PIKE,
LUTHER H. PIKE,
Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1878.

BARNARD P. MIMMACK
v.
THE UNITED STATES.

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FACTS.

In May, 1868, the petitioner was a captain of the Thirtieth Regiment of Infantry and brevet major, stationed at Fort Sidney, under command of General Potter.

Charges, with specifications of drunkenness, had, previous to the 10th of May, been preferred to General Potter against the petitioner, who proposed that he would place his resignation in the hands of General Potter, to be held by him, and not forwarded to the War Department, if he abstained entirely from the use of intoxicating liquors, and on the 10th of May the petitioner inclosed his resignation to General Potter in a letter, stating that it was without date, and authorizing him to place it in General Augur's hands, to be forwarded to the War Department if he should ever become intoxicated again. General Potter sent the resignation and the letter of the petitioner to General Augur, and in-

formed him of the understanding had with the petitioner above stated.

Previous to October 3, 1868, the petitioner was again intoxicated, and by excess in drunkenness was confined to his bed in a state bordering on *delirium tremens;* and by letter of October 3, 1868, General Potter informed General Augur that the petitioner had again broken out, drinking hard; and on the 5th day of October General Augur forwarded the petitioner's resignation, with the date filled up by "October 5, 1868," to the War Department.

[This date was not filled up by the petitioner, nor was he informed of the communication of General Potter, nor of the fact that his resignation was to be forwarded to the War Department.]

On the 29th of October, 1868, the resignation was accepted by the President, to take effect from that date, and notice of the acceptance was sent to the petitioner and received by him November 8, 1868. It did not appear that the President, at the time of accepting the resignation, had been informed of the manner in which it had been lodged with General Potter, or of the fact that the date had been filled by a third person, or of any of the circumstances attending the resignation.

On the 18th of November, 1868, the President promoted First Lieutenant Appleton D. Palmer to be "captain in the Thirtieth Regiment of Infantry," *vice* Mimmack, resigned; and notice thereof was sent by letter to Captain Palmer, of that date, but he was not then commissioned.

On the 8th of December Lieutenant Palmer was placed on the list of nominations made by the President to be sent to the Senate.

On the 11th of December the President, on petitioner's

application, revoked his acceptance of the resignation of the petitioner, and ordered him to duty, and notice thereof was given to the Secretary of War.

On the 12th of December a report was made to the President of the facts of the case by the War Department, and the report was returned to the Secretary of War by the President for action, under the order of December 11, 1868.

The report and direction of the President were referred to the General of the Army, who requested that, before an order was issued, the opinion of the Attorney-General should be obtained as to the legality of the President's revocation of his acceptance of the petitioner's resignation.

On the 30th of December, 1868, by direction of the President, the name of Lieutenant Palmer was stricken from the list of nominations made by the President to be sent to the Senate, and the Secretary of War notified thereof.

On the 4th of January, 1869, the case of the petitioner, with the papers relating thereto, were submitted by the Secretary of War to the Attorney-General, who, on the 4th of February, gave it as his opinion that the President's revocation of his acceptance of the petitioner's resignation had not the effect of restoring him to his former position in the military service.

On the 13th of February, 1869, the opinion of the Attorney-General and the papers containing the President's order were sent to the General of the Army, who declined to permit his name to be used in promulgating the order, as in his opinion it was illegal; and he was sustained by the opinion of the Attorney-General.

[These occurrences took place during the term of President Johnson.]

On March 11, 1869, President Grant nominated Lieutenant Palmer to the Senate. The nomination was accompanied by a note, which stated that Lieutenant Palmer [and certain other officers] had received during the recess of Congress letters of promotion, giving them the rank for which they were nominated; that President Johnson had directed that their names should be struck from the list of nominations, as he had ordered the restoration of Captain Mimmack, by whose resignation the vacancy had been created entitling them to promotion; and that this order of the President, upon being submitted to the Attorney-General, had been decided by him to be illegal, and submitted their names to the action of the Senate.

The date as of which Lieutenant Palmer was nominated was October 29, 1868.

No action was taken upon this nomination of President Grant.

On the 6th of December, 1869, the President again nominated Lieutenant Palmer for promotion as of date October 29, 1868, to be captain, vice Mimmack, resigned; and accompanying the nomination was a similar statement of facts as that which was sent with the earlier nomination.

The Senate subsequently advised and consented to the appointment of Lieutenant Palmer as captain, vice Mimmack, resigned, as of date October 29, 1868.

On February 19, 1869, the petitioner enlisted in the Marine Corps, and served in the Navy as clerk, and as secretary to the commanders of squadrons from that date until May 22, 1872, receiving as pay $2,344.09.

On November 2, 1872, the petitioner was appointed a clerk in the Treasury, and served therein till June 30, 1874, receiving pay to the amount of $2,082.49.

ARGUMENT.

The incident having happened upon which General Potter had authority to transmit Mimmack's resignation to the War Department, the transmission thereof was legally the act of the petitioner. It was an act fully authorized by him. Whether or not the circumstances under which he had tendered the resignation, and the conditions to which it was subject, were known to the President, is unimportant, inasmuch as it was shown that the transmission was in full accordance with the condition upon which the officer in whose hands it was held it. It was a legal act of the petitioner. The resignation was not less voluntary because at the time it was made provisional by the petitioner he was exposed to charges for misconduct. There was no duress when the only thing threatened was a lawful proceeding, and no release from duress when all that was done by his commanding officer was to abstain from such legal proceeding upon a solemn promise made by him of future good conduct, and, further, a resignation which was to have effect upon such misconduct. Mere resignation, in the case of a civil officer, is sufficient to release the party from the duties of his office. It takes effect as soon as the party entitled to receive it is informed. But no light can be gained upon this subject by considering what is necessary to effect a complete resignation of a civil office. From the exigencies of the military service, it is contemplated that every officer remains liable to perform the duties which he has engaged to perform until an acceptance has been made by the Executive. The statute of August 5, 1861, section 12 (12 Stat., 316), prescribes, "That any commissioned officer of the Army, Navy, or Marine Corps who, having tendered his resignation, shall, prior to due notice of the

acceptance of the same by the proper authority, and without leave, quit his post or proper duties with the intent to remain permanently absent therefrom, shall be registered as a deserter, and punished as such." This statute prescribes definitely the time when, and the means by which, an officer ceases to belong to the Army and to be subject to military rules and orders. He is a member of the Army until he has received notice of the acceptance of his resignation. That resignation may never be accepted, if the Executive does not see fit to accept it. The necessary inference also to be drawn is, that when the officer has received notice of the acceptance of his resignation, he is no longer subject to the rules and regulations of the Army, and is no longer a member of it. The resignation in this case was in itself absolute, was transmitted upon the occurrence of the incident upon the taking place of which it was to be transmitted, and was accepted by the President with full knowledge of all the facts necessary for his action. When thus accepted the right of others to promotion occurred. And even if his successor was not actually nominated, or actually confirmed by the Senate, his right to promotion was fixed. The act of March 30, 1814, section 12 (3 St., 114), provides: "From and after the passing of this act promotions may be through the whole Army, in its several lines of light artillery, light dragoons, artillery, infantry, and riflemen, respectively, and that the relative rank of officers of the same grade belonging to regiments or corps already authorized, or which may be engaged to serve for five years or during the war, be equalized and settled by the War Department agreeably to established rules." The executive regulation in force at its passage was as follows: "Original va-

cancies will be supplied by selections; accidental vacancies by seniority, except in extraordinary cases (disability or incompetency of the senior officer). Promotions to the rank of captains will be made regimentally; to that of field appointments, by line; the light artillery, dragoons, artillery, infantry, and riflemen being kept always distinct." The act of March 3, 1813, section 5 (2 St., 819), required the Secretary of War to prepare a system of general regulations. The regulations prepared pursuant to this law were approved by the President May 1, 1813, and no change whatever was made in the rules with regard to promotion as above quoted. The act of March 3, 1851 (9 St., 618), provided: "That all promotions in the staff department or corps shall be made as in other corps of the Army." Lieutenant Palmer was of right entitled to this promotion before the President revoked his acceptance. The rights which the petitioner had had been conferred by the President and Senate. When he resigned, and the President accepted his resignation, the joint act of the Senate and President could alone reinvest him with them. (Vide Dubarry's Case, 4 Op. Att'y Gen'l, 124; Whitney's Case, *id.*, 277; Kendall's Case, *id.*, 306; Downing's Case, 7 *id.*, 99.) It is not important to consider why those cases in which it was held that a resignation tendered by an officer when insane might properly be revoked. The revocation in such case proceeds upon the ground that the act done was not the act of an intelligent party, and therefore not the act, in a legal sense, of the person doing it. This case is the case of a resignation intelligently made and distinctly accepted. Again, the petitioner joined the Navy and served. He cannot be allowed to maintain, when he by his voluntary act be-

came subjected to the rules of the naval service, that he was still an officer of the Army. The same argument applies to his entering into the civil service of the government.

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Attorney-General.
JOHN S. BLAIR.

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